

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Matter of The Second Complaint of Mary Jo Fox Against Brad Molnar No. COPP 2010-ETH-3	DECISION AND FINAL ORDER
--	--------------------------

This Matter presents as the second ethics complaint filed by Mary Jo Fox against Brad Molnar. The issues presented and resolved are set out below.

INTRODUCTION

Montana law, at Title 2, Parts 1 and 2 of the Montana Code, sets out a Code of Ethics governing conduct of those engaged in public duty. The role of the of Commissioner's office is defined at §2-2-136 MCA.

Mary Jo Fox filed four earlier ethics complaints against Molnar under the provisions of §2-2-136 MCA.¹ These complaints were consolidated into one Matter (Fox v Molnar COPP-2010 Eth 2), hereafter *Molnar I*. *Molnar I* progressed through a 3 day hearing officer trial, leading to the Hearing Officer's proposed decision and order dated March 9, 2010. Commissioner Unsworth reviewed that proposal and on September 13, 2010 issued his 32 page Decision and Final Order. The Hearing Officer and Commissioner Decisions in *Molnar I*

¹ The Hearing officer's decision in this Matter lists two of the four earlier complaints in its procedural background. The remaining 2 are listed in *Molnar v Fox* 2013 Mt. 132, 370 Mont. 238, 301 P. 3d 824.

found Molnar committed seven ethical violations and assessed fines of \$5,750 and costs of \$14,495.

Molnar appealed *Molnar I* to district court (which affirmed the Commissioner) and then again to the Montana Supreme Court. On June 12, 2013 the Montana Supreme Court unanimously affirmed the decisions of the district court and the Commissioner. *Molnar v Fox* 2013 Mt. 132, 370 Mont. 238, 301 P. 3d 824. The Supreme Court's decision affirmed the findings of ethical violations, the fine of \$5,750 and the costs of \$14,495.

In September of 2010, while *Molnar I* was progressing through its several levels of decision, Mary Jo Fox filed a new ethics complaint (*Molnar II*) against Molnar based on information disclosed during the hearing process of *Molnar I*. A new hearing Officer, Elizabeth Griffing, was duly appointed by the Commissioner. In July of 2012 the hearing Officer and the parties agreed to waive confidentiality in *Molnar II*. Further, the hearing officer declared her intention to proceed with *Molnar II* under a summary decision approach based on a transcript review, as allowed by §2-2-136(b) MCA.

While the hearing officer did allow some briefing, on June 13, 2013 the hearing officer issued her proposed decision and order in *Molnar II* under the summary decision approach. That proposed decision and order accompanies this final decision and order. Unless modified herein the content and wording of that proposed decision and order in *Molnar II* is adopted verbatim as though set out in full. In particular, the proposed decision and order succinctly

summarizes and describes the interrelationship of *Molnar I* and *Molnar II* and that summary and description is incorporated as though set out in full herein.

PROCEDURAL RULINGS

The Commissioner hereby makes the following procedural decisions or rulings in regard to the proposed decision and order in *Molnar II*:

1. The Commissioner hereby affirms and decides that the Hearing Officer properly identified and used the summary decision powers of §2-2-136(b) MCA. An informal contested case hearing was not necessary as to *Molnar II*.
2. The Commissioner hereby affirms and decides that the Hearing Officer properly denied Molnar's several motions to dismiss.
3. The Commissioner hereby affirms and decides that the Hearing Officer properly denied Molnar's objections to a summary decision approach based on a transcript review (without an informal hearing), as allowed by §2-2-136(b) MCA.
4. The Commissioner hereby affirms and decides that the Hearing Officer properly denied Molnar's motions to disqualify the Commissioner and the hearing officer.

SUBSTANTIVE RULINGS

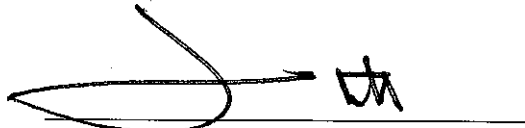
The Commissioner, under the authority of §2-4-621(3) MCA, and having reviewed the proposed decision and order along with the record in this Matter, hereby decides and adopts, as though set out in full, the Findings of Fact, Discussion and Order of *Molnar II* as set out in the June 13, 2013 proposed

decision and order of the hearing officer. Having so decided, the Commissioner hereby dismisses the Complaint in this matter.

ORDER

It is HEREBY ORDERED that the complaint in this Matter is fully and finally dismissed. By this Order the Commissioner resolves a contested case. The parties are hereby notified that they have a right to seek judicial review of this Decision as allowed by the provisions of Montana Code Annotated §§2-4-701 through 2-4-711.

Made this 10th day of July, 2013.

A handwritten signature in black ink, appearing to read 'JRM', is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA

MARY JO FOX,

Complainant and Charging Party,

v.

BRAD MOLNAR,

Respondent.

**PROPOSED DECISION
AND ORDER**

PROCEDURAL BACKGROUND

In June 2008, Mary Jo Fox (hereinafter "Fox") filed two complaints with the Montana Commissioner of Political Practices, Dennis Unsworth, against then Public Service Commissioner, Brad Molnar (hereinafter "Molnar"). These complaints alleged: (1) that Molnar had committed violations of the state ethics law by soliciting and receiving gifts from two entities, Northwestern Energy and PPL Montana; and (2) that Molnar improperly used State equipment and resources for electoral or private business purposes.

A hearing was held on these original complaints from November 4 through November 6, 2009. The hearing examiner issued a proposed decision on March 9, 2010, holding that Molnar had violated the Montana Ethics Code and imposing sanctions. These sanctions were upheld by Commissioner Unsworth, affirmed by the State district court, and ultimately affirmed by the Montana Supreme Court. *See In the Matter of the Complaint of Mary Jo Fox v. Brad Molnar, Proposed Decision* (dated March 9, 2010); *Final Agency Decision* (dated September 13, 2010);

Molnar v. Fox, Montana Thirteenth Judicial District Court, Yellowstone County, DV 10-718 (Order and Memorandum dated February 12, 2012); and *Molnar v. Fox*, 2013 Mont. 132 (Decision of Montana Supreme Court dated May 15, 2013, DA 12-0373). These decisions are collectively referred to herein as *Molnar I*.

During the administrative hearing in *Molnar I*, testimony and evidence was presented of solicitations and payments that were not part of the original *Molnar I* complaints. The June 2008 complaints from Fox had alleged that Molnar had violated § 2-2-104, MCA, by receipt of two \$1000 checks, one from Northwestern Energy and the other from PPL Montana to sponsor an event called the "Billings Brownout." ¶ 7, 2013 Mont. 132. Evidence at the *Molnar I* administrative hearing also showed that Molnar had received cash from Walmart amounting to approximately \$400 to support the Billings Brownout, but that the Walmart payments were not part of the *Molnar I* decision. See *Molnar I, Final Decision of Commissioner, Facts* at 8, ¶ 7, n. 4 ("Respondent's solicitation and receipt of money from Walmart were not part of the Complaints(see pages 2-3), and are referenced herein only for the purpose of completeness.") Evidence at this hearing also showed that Molnar had received a second check of \$1000 from Northwestern Energy which he returned uncashed and was considered only for background purposes. See *Final Decision of Commissioner, Facts* at p. 8 ¶ 6, n. 3 ("Respondent's solicitation and receipt of the second \$1000 from Northwestern is not part of the complaints decided in this matter. It is referenced only as background, and is not a basis for a finding of a violation of law.")¶ 15; and at p.19 (relief limited to the "original" gifts received from Northwestern Energy and PPL Montana.)

On March 17, 2010, shortly after the hearing examiner's proposed decision, Fox filed a

second ethics complaint against Molnar asking that the new evidence be considered as part of her original complaint. This second complaint alleged ethics violations against Molnar for the following:

- 1). the solicitation of approximately \$450 from Walmart for the Billings Brownout event;
- 2). the second solicitation and check received but not cashed from Northwestern Energy for \$1000;
- 3). the solicitation from Northwestern Energy for \$1000; and
- 4). the solicitation from MDU for \$1000.

After the Commissioner declined to address these new claims as part of the original ethics complaint, Fox filed a third ethics complaint was on September 17, 2010 that served to replace the March 17, 2010 complaint. This last complaint was substantially similar to the March 17th complaint in that it reasserted the above-listed claims. The September 17th complaint noted, however, it was not a "continuation" of the original ethics complaint of June 2008, but rather a separate complaint. It is this September 17, 2010 complaint (hereinafter referred to as the "second complaint") that is the subject of this proposed decision.

To support her claims in the second complaint, Fox submitted and relied exclusively on the transcript of the hearing held on November 6-8, 2009. Fox also requested the Commissioner to issue a summary decision without holding an informal contested case hearing. Fox made this request based upon § 2-2-136(1)(b), MCA, which provides:

The commissioner may dismiss a complaint that is frivolous, does not state a potential violation of this part, or does not contain sufficient allegations to enable the commissioner to determine whether the complaint states a potential violation

of this part. If the issues presented in a complaint have been addressed and decided in a prior decision and the commissioner determines that no additional factual development is necessary, the commissioner may issue a summary decision without holding an informal contested case hearing on the complaint.

Because the issues raised in Fox's second complaint are substantially similar to those raised in her first complaint and no additional factual development is necessary, the determination was made to proceed with a summary decision pursuant to § 2-2-136(1)(b), MCA.

Although not required by statute, the parties were notified of the hearing examiner's intention to proceed with a summary proceeding, and were provided the opportunity to provide additional information and arguments regarding the second complaint. Both parties provided substantial written arguments.

Molnar asserted the claims in the second complaint should be dismissed, based largely upon arguments made in the first ethics complaint. In the alternative, Molnar requested an informal hearing to allow discovery and testimony to determine "jurisdiction", to discuss the "true role" of the various Chambers of Commerce, newspapers, schools, students, utilities and others falsely accused along with Molnar." Response of Molnar, dated August 16, 2012 at 3. He also sought a hearing to develop arguments based on "freedom of speech, 14th Amendment issues, right to political protest [etc.]," and claiming that to deny a hearing was denial of due process on the contested items. *Id.* Notably, Molnar did not raise any significant questions of fact that would require development at a hearing.

Molnar's objections to summary disposition are not well taken. The factual bases for Fox's second complaint were fully developed at the first administrative hearing with much of the evidence and testimony provided by Molnar himself. Molnar has presented no argument

showing an outstanding question of fact to be determined by a subsequent hearing. The grounds for Molnar's motion to dismiss were recently rejected by the Montana Supreme Court. As such, summary disposition is deemed appropriate.

Molnar also filed an affidavit seeking disqualification of former Commissioner Jim Murry and the undersigned hearing examiner. The disqualification of former Commissioner Murry has been rendered moot as he is no longer in office. I have provided the attached affidavit indicating my experience and attesting to no connection with the issues raised in this matter. My experience and Molnar's claims were initially discussed with Commissioner Murry and his staff shortly after the motions to disqualify were filed. At that time, Commissioner Murry advised me to proceed with a proposed decision, outlining for the record my experience, and a discussion and analysis of relevant case law.

Molnar gives as the basis for disqualification that I was the former "head of the Montana ACLU, a liberal legal attack group," contributed only to Democratic candidates, was actively involved in the candidacy of Pam Bucy for Montana Attorney General and Elizabeth Best for Supreme Court Justice, and that I am "allied with the Human Rights Network." Affidavit of Molnar at 2. He further bases his request for disqualification on the grounds that I do not work for an agency, was not appointed for expertise in Title 69 law, or any other known component of the case. *Id.* at 3. Lastly, he claims my expertise rests only in "Native American religious freedom" and "LGBT litigation." He further asserts that other "than political loyalty there is nothing to recommend Betsy Griffing for this position." *Id.*

I submit for the administrative record my affidavit of legal experience in response to Mr. Molnar's assertions and defer to the Commissioner for final determination of this issue.

Mr. Molnar cites to § 2-4-611, MCA, to support his motion to disqualify. That section states that a hearing examiner must be assigned with due regard to the expertise required for the particular matter. Molnar also suggests § 2-4-611(2), MCA, sets a requirement that a hearing examiner must work for a state agency. Contrary to Molnar's assertion, § 2-4-611(2), MCA, is designed primarily to address the situation where a hearing examiner is requested from a state agency legal assistance program. Section 2-4-611(2), MCA, states that an agency *may* elect to request a hearing examiner from an agency legal assistance program in the attorney general's office and if it does so the date, time and place of the hearing must be determined by the agency, not the legal assistance program. By its plain language, it does not impose a requirement that a hearing examiner work for a state agency.

Molnar also asserts that a hearing examiner's campaign contributions to Democratic candidates show personal bias. The contributions listed, however, are mostly for candidates for Montana Supreme Court justice, which is a non-partisan position. Such contributions are nonetheless irrelevant to the ethics claims being made in the Fox complaint. Personal bias and independence were recently addressed by the Montana Supreme Court in *Reichert et alia v. State of Montana*, 2012 Mont. 111, 365 Mont. 92, 278 P.3d 455. As the Montana Supreme Court noted in the context of judicial recusal, there is a presumption of honesty and integrity in those acting as adjudicators, and due process requires recusal only in extreme cases where the judge had a "direct, personal, substantial, [or] pecuniary interest" in a case. *Reichert*, ¶¶ 31, 39. Molnar's contentions regarding campaign contributions to Montana Supreme Court candidates are irrelevant to the matter at hand, do not overcome this presumption, and do not rise to the level of an extreme case warranting disqualification of the hearing examiner.

Moreover, the Montana Supreme Court has stated that claims of impartiality by a state agency do not form the basis for a due process violation because of the availability of judicial review of the proceedings. *Schneeman v. State Dept of Labor and Industry*, 257 Mont. 254, 848 P.2d 504 (1992). This proposed decision has the dual protection of review by the new Commissioner of Political Practices as well as judicial review. See § 2-2-136(3), MCA.

It is therefore recommended that Molnar's motion to disqualify the hearing examiner be denied.

PROPOSED FACTS

I. The money Molnar received from Walmart to support the Billings brownout.

Molnar testified that he had asked both of the Walmart stores in the Billings area "for money for the brownout event." Tr. at 63.¹ Molnar stated that he walked into the stores, introduced himself, told them what he was doing, and "asked for money." *Id.* He talked with the general managers of the stores and introduced himself as Brad Molnar, the Public Service Commissioner for the area.

Molnar testified that as far as he could recall, he received "about 450 bucks." *Id.* He said he may have received a check, but thought most of the money was in cash directly from the till at the Walmart stores. Tr. at 260-61. He actually went back to one of the stores again to ask for more money. Tr. at 65. Molnar testified that he did not put the check or cash into his personal checking account, but rather used the cash to pay for distribution of the brochures about the Billings Brownout. Tr. at 261-63. Molnar testified he used the Walmart money to pay his

¹Transcript references are to the transcript of the administrative hearing held on the first ethics complaint November 6-9, 2009. That transcript is hereby incorporated into the record in this matter.

“soon-to-be daughter in law and her sister” to help pass out the brochures he had made for the brownout. Tr. at 65.

II. Money for the Laurel and Miles City conservation challenge.

In February 2008, Molnar solicited a second check of \$1000 from Northwestern Energy to support another energy conservation event— a conservation challenge between the cities of Laurel and Miles City. Tr. at 128-9; 141. Molnar contacted Bill Thomas, a representative of Northwestern Energy, to defray the costs of producing educational brochures for a conservation challenge event in Laurel. A check of \$1000 was sent by Northwestern Energy on March 11, 2008 to Molnar based on Molnar’s request for the money. Tr. at 131, 136, 577, *see* email message from William Thomas to Brad Molnar dated March 12, 2008, stating “Northwestern sent a check to you yesterday, March 11, 2008, for \$1000 to help cover expenses associated with the upcoming Laurel Brownout event,” attached as part of Fox Exhibit J-4 in the *Molnar I* administrative hearing.²

Molnar did not cash the second \$1000 check. Instead, the check was returned to the Northwestern representative, Bill Thomas, uncashed on March 19, 2009, on the same date that Molnar wrote a check reimbursing Northwestern Energy for the first \$1000 that had been used to produce the brochures in the fall of 2008. *See* Fox Exhibits J-2, J-3, and J-5.

Molnar testified that he set up three energy conservation events: the Billings Brownout, and then several months later, he organized a “conservation challenge” between the communities of Laurel and Miles City. Tr. at 495; 498. The idea for the conservation challenge was to have

²Exhibit references are to those exhibits admitted at the hearing held November 6-9, 2009.

the two communities compete against each other for the greatest energy savings. *Id.* Both communities were in Molnar's district. He had Montana Dakota Utilities (MDU) do a baseline measurement for Miles City and Northwestern Energy do a baseline for Laurel. Each company would then also do simultaneous measurements of those communities during the brownout. Molnar prepared a graph of the measurements made by MDU of the savings in Miles City during the conservation challenge with Laurel. *See* Ex. G, admitted at the first hearing November 6-9, 2009.

Molnar solicited money from both MDU and Northwestern Energy to support the conservation challenge. He asked Northwestern Energy to fund the Laurel side of the competition and MDU to fund the Miles City side of the competition. Tr. at 498.

John Alke, an attorney for MDU, raised questions concerning the propriety of contributing money to Molnar for the conservation challenge. He asked Molnar if he had organized a charitable organization and if that organization was to receive the monies, to which Molnar said he had not created a charitable organization for receipt of the monies. Tr. at 498. Alke told Molnar that MDU wanted to avoid any problems and would rather not make a payment directly to him. Tr. at 499. Molnar believed that Alke contacted Northwestern Energy as well. Northwestern Energy representatives similarly said they were not comfortable with the cash payment to Molnar for the Laurel/Miles City conservation challenge. Northwestern Energy sent a letter to Molnar asking that they be reimbursed for the Billings Brownout. They also asked Molnar not to cash the \$1000 for the Laurel event but to send it back. Molnar agreed, wrote out a check for \$1000 to reimburse Northwestern Energy for first check for the Billings Brownout, and then sent back uncashed the second check for the Laurel event. Tr. at 499, 584. Molnar's

reimbursement check and the returned uncashed check were put in the same envelope and mailed to Northwestern Energy on March 19, 2008. *Id.*

Although Northwestern Energy and MDU did not contribute money directly to Molnar for the Laurel/Miles City conservation challenge, they did give money to the local chambers of commerce to support the event. Molnar had called John Alke to see if MDU would still make the contribution to a charitable or 501(c)(3) organization. Tr. at 500. Molnar suggested that they pay the money directly to the chambers of commerce of each community. Tr. at 501, 578-80. Northwestern Energy paid \$500 to the Laurel chamber of commerce and MDU paid \$500 to the Miles City chamber of commerce. Tr. at 501, 578-80, 585. Molnar used the two checks for \$500 from Northwestern Energy and MDU to pay for two brochures, one printed by the Miles City Star and the other the Laurel Outlook. Tr. at 579.

DISCUSSION

I. The payments from Walmart

The Montana Supreme Court recently upheld the Commissioner's previous decision that payments received by Molnar to support the Billings brownout event were gifts, received in violation of § 2-2-104(1)(b)(i), MCA. *See Molnar I*. As applied to Molnar's situation, that statute prohibits a public officer or employee from receiving a gift "of substantial value" that would "tend improperly to influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties."

In *Molnar I*, the Court also held that Mary Jo Fox had standing to bring an ethics complaint against Molnar. ¶ 10. The Court recognized that standing to bring an ethics complaint is controlled by § 2-2-136(1), MCA, which allows any person to file an ethics

complaint. Molnar has again challenged Fox's standing to bring this complaint. His challenge fails in light of the Court's decision in *Molnar I*.

The next question is whether or not the money Molnar received was a "gift." Again, the *Molnar I* decision is controlling in this regard. Molnar, by his own testimony, states that he received approximately \$450 from the Walmart stores. He stated that most of the money was in cash and he had no records showing an accounting of the money. He testified it was used to pay people who distributed the brochures on the Billings brownout.

The Walmart money constitutes a gift under the Montana Ethics Code. Using prior interpretations by the Commissioner, the Montana Supreme Court adopted the definition of "gift" as "something voluntarily transferred by one to another without compensation." ¶ 27, *Molnar I*. The Walmart money was voluntarily transferred by Walmart to Molnar without compensation. Moreover, it was a "gift of substantial value" as it was more than \$50. See § 2-2-102(3)(a), MCA.

The final question is whether the Molnar's acceptance of the \$450 gift was unlawful. Under § 2-2-104(1)(b)(i), MCA, a gift is unlawful when it would "tend improperly to influence a reasonable person in [Molnar's] position to depart from the faithful and impartial discharge of the person's duty." In *Molnar I*, the Court analyzed whether or not money from Northwestern Energy met this standard. Quoting the hearing examiner in *Molnar I*, the Court affirmed that receipt of the money from Northwestern Energy, a regulated entity, could result in a quid pro quo treatment, no matter how subtle or small. ¶ 30. The Court concluded the money from Northwestern Energy could therefore tend to improperly influence Molnar to depart from the faithful and impartial discharge of his duties.

The Court in *Molnar I* then analyzed whether receipt of the gift from PPL was also unlawful, even though PPL was not an entity directly regulated by the PSC. The Court held that the logic of quid pro quo extended to “parties whose interests include intervening and regularly participating in PSC proceedings.” ¶ 31.

Walmart is neither a regulated entity nor an entity whose interests include intervening and regularly participating in PSC proceedings. Although there was testimony at the hearing that the PSC oversees the quality and safety of the services provided by Northwestern Energy (tr. at 163-64), there was no evidence that Walmart has ever appeared in front of the PSC or filed a complaint regarding the quality and safety of the energy services it received. There was no evidence of the danger of quid pro quo with respect to Walmart. As such, the gift received by Molnar from Walmart should not be considered unlawful under § 2-2-104(1)(b)(i), MCA.

II. The money for the Laurel and Miles City conservation challenge.

A. The second \$1000 check from Northwestern Energy

Molnar admitted that he solicited and received another check of \$1000 from Northwestern Energy. The check was sent on March 11, 2008. Molnar testified that this check was returned to Northwestern Energy uncashed on March 19, 2009 along with his own reimbursement check for the first \$1000 from Northwestern Energy.

The term “gift of substantial value” does not include “a gift that is not used and that, within 30 days after receipt, is returned to the donor.” § 2-2-102(3)(b)(i), MCA. Here, the check was returned to Northwestern Energy within 30 days and therefore it cannot be considered a gift of substantial value.

B. The payments made by Northwestern Energy and MDU to the chambers of

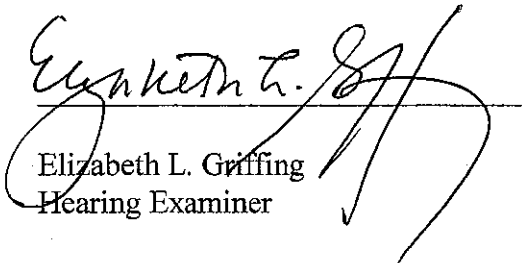
commerce.

Although Molnar orchestrated the payments made to the chambers of commerce for Laurel and Miles City, he did not received them. A \$500 payment from Northwestern Energy went to the Laurel chamber of commerce and a \$500 payment from MDU went to the Miles City chamber of commerce. Under § 2-2-104(1)(b), MCA, a public officer may not "accept a gift." There was no evidence that Molnar ever accepted the \$500 payments and therefore the payments made to the chambers of commerce cannot be considered unlawful gifts under §2-2-104, MCA.

ORDER

The ethics complaints against Molnar based upon his receipt of money from Walmart for the Billings brownout, his return of the second \$1000 check from Northwestern Energy and his orchestrating payments to the chambers of commerce for Laurel and Miles City from Northwestern Energy and MDU, respectively, should be dismissed.

Dated this 13th day of June, 2013.


Elizabeth L. Griffing
Hearing Examiner